Public Prosecutor v Jasli bin Amir Salleh

HIGH COURT (IPOH) — CRIMINAL TRIAL NO M6–42–14 OF 2008
TEO SAY ENG JC
12 JANUARY 2010

Criminal Law — Rape — Appeal against acquittal and discharge — Defence of alibi — Evidence in support of — Admissibility — Failure to give notice in writing to public prosecutor — Respondent's defence held not defence of alibi — Whether misdirection in fact and in law — Criminal Procedure Code s 402A

Criminal Procedure — Charge — Amended in course of trial — Particularisation as to time and place — Failure to specify date of commission of offence — Whether amended charge defective — Whether respondent prejudiced to fair trial — Whether non-inclusion altered legal position as to requirement of alibi notice

Criminal Procedure — Defence — Alibi — Notice of alibi not given to public prosecutor before commencement of trial — Admissibility of evidence in support of alleged defence of alibi — Whether sessions court judge misdirected in fact and in law when holding respondent's defence not one of alibi — Criminal Procedure Code s 402A

The appellant was appealing against the decision of the sessions court judge ('SCJ') for acquitting and discharging the respondent the end of the defence case. The respondent herein was alleged to have raped SP1, the victim, during the school holidays, sometime in December 2002, when she stayed with the respondent, her uncle, in his house which was an army barrack at Kem Syed Putra Jalan Tambun, Ipoh. The time of commission of the offence in the initial charge was in the months of December 2002 and February 2003 but on the day of the commencement of the trial, the time of the commission of the offence was amended to 'the month of December 2002'. In his defence, the respondent informed the court that in the month of December 2002, he was no longer staying at Kem Syed Putra as he had, since October 2002, moved into his own house in Batu Gajah. At the conclusion of the defence case, the learned SCJ found that the defence story had successfully created a reasonable doubt in the prosecution case, thereby acquitting and discharging the respondent at the conclusion of the trial. It was against the said decision that the appellant filed an appeal to this court. The main issue for the determination in this appeal was on the admissibility of evidence in support of the alleged defence of alibi in view of the failure of the defence to give notice in writing to the public

A prosecutor at least ten days before the commencement of the trial as required by s 402A of the Criminal Procedure Code ('CPC'). The prosecution contended that the evidence adduced by the defence was in support of an alibi defence and it was clearly not admissible as the defence had failed to give the prosecution ten days' notice before the commencement of the trial. On the B issue of the admissibility of the alibi defence, this court had to determine whether the learned SCJ had misdirected herself in fact and in law in holding that the defence put forward by the respondent was not one of alibi. The respondent however, strongly argued that s 402A was not applicable as the amended charge lacked sufficient particularisations as to the time and place of C the offence alleged to have been committed.

Held, allowing the appeal:

(1) A careful perusal of the evidence put forward by the defence tends to D show that for the month of December 2002 the respondent no longer stayed at Kem Syed Putra as he had moved out from the camp to stay in his own house at Batu Gajah in October 2002. He stated that in December 2002, he had gone back to Sabah with his wife as he was on leave. His defence tends to show that by reason of his presence in Sabah E during the month of December, it was unlikely that he was at the place where the offence was committed. From the evidence adduced by the defence, it clearly showed that the defence put forward by the respondent was one of alibi. The learned SCJ therefore, erred in law and in fact in holding that the defence raised was not a defence of alibi (see para 24).

F (2) In the present case, the original and amended charges referred to one and the same occasion in the month of December 2002. The charge had specifically defined the time and place in which the offence was alleged to have been committed and was therefore sufficient to enable the respondent to answer the charge (see para 31).

G (3) This court was unable to agree that in every case where the charge is amended as to time, either before or after the commencement of the trial, the requirement of notice under s 402A of the CPC does not apply. It should be borne in mind that where the charge relates to one occasion, H merely amending the time in the charge would not necessarily constitute changing the occasion. Each situation must depend on the facts and circumstances of the particular case (see para 31).

[Bahasa Malaysia summary

I Perayu merayu terhadap keputusan hakim mahkamah sesyen ('HMS') bagi melepaskan dan membebaskan responden pada akhir kes pembelaan. Responden di sini didakwa telah merogol SP1, mangsa tersebut, semasa cuti sekolah, dalam bulan Disember 2002, apabila dia tinggal bersama-sama responden, pakciknya, di rumahnya yang merupakan berek tentera di Kem

Syed Putra Jalan Tambun, Ipoh. Masa kesalahan tersebut dilakukan di dalam pertuduhan awal adalah dalam bulan-bulan Disember 2002 dan Februari 2003 tetapi pada hari perbicaraan bermula, masa kesalahan dilakukan dipinda kepada 'the month of December 2002'. Di dalam pembelaannya, responden memberitahu mahkamah bahawa dalam bulan Disember 2002, dia tidak lagi tinggal di Kem Syed Putra kerana dia telah, semenjak Oktober 2002, berpindah ke rumahnya sendiri di Batu Gajah. Pada akhir kes pembelaan, HMS mendapati bahawa kes pembelaan telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan, dengan itu melepaskan dan membebaskan responden di akhir perbicaraan. Ia adalah terhadap keputusan tersebut yang perayu memfailkan rayuan di mahkamah ini. Isu utama untuk pemutusan di dalam rayuan ini adalah kebolehterimaan keterangan dalam menyokong pembelaan alibi yang didakwa disebabkan oleh kegagalan pihak pembelaan memberikan notis bertulis kepada pendakwa raya sekurang-kurang nya sepuluh hari dari tarikh permulaan perbicaraan seperti yang diperlukan oleh s 402A Kanun Prosedur Jenayah ('KPJ'). Pihak pendakwaan menghujah bahawa keterangan yang dikemukakan oleh pihak pembelaan adalah dalam menyokong pembelaan alibi dan ia jelas tidak boleh diterima kerana pihak pembelaan telah gagal untuk memberikan pihak pendakwaan notis sepuluh hari sebelum permulaan perbicaraan. Atas isu kebolehterimaan pembelaan alibi, mahkamah ini perlu memutuskan sama ada HMS telah tersalah arah dirinya sendiri dari segi fakta dan undang-undang dalam memutuskan bahawa pembelaan yang dikemukakan oleh responden bukanlah alibi. Responden, walau bagaimanapun, dengan tegas berhujah bahawa s 402A tidak beraplikasi kerana pertuduhan yang dipinda tidak mempunyai cukup butiran tentang masa dan tempat kesalahan yang didakwa telah dilakukan.

Diputuskan, membenarkan rayuan:

(1) Penelitian terhadap keterangan yang dikemukakan oleh pihak pembelaan menunjukkan bahawa pada bulan Disember 2002 responden tidak lagi tinggal di Kem Syed Putra kerana dia telah berpindah dari kem tersebut untuk tinggal di rumahnya sendiri di Batu Gajah dalam bulan Oktober 2002. Dia menyatakan bahawa dalam bulan Disember 2002, dia telah pulang ke Sabah bersama dengan isterinya kerana dia bercuti. Pembelaannya menunjukkan bahawa atas sebab kehadirannya di Sabah semasa bulan Disember, adalah tidak mungkin bahawa di berada di tempat di mana kesalahan tersebut dilakukan. Daripada keterangan yang dikemukakan oleh pembelaan, ia jelas menunjukkan bahawa pembelaan yang dikemukakan oleh responden adalah alibi. HMS yang bijaksana, oleh itu, terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa pembelaan yang dibangkitkan bukan pembelaan alibi (lihat perenggan 24).

(2) Di dalam kes ini, pertuduhan asal dan dipinda merujuk kepada kejadian yang sama dalam bulan Disember 2002. Pertuduhan tersebut telah secara

khusus menyatakan masa dan tempat di mana kesalahan tersebut didakwa telah dilakukan dan oleh itu adalah mencukupi untuk membolehkan responden menjawab pertuduhan tersebut (lihat perenggan 31).

(3) Mahkamah ini tidak boleh bersetuju bahawa di dalam setiap kes di mana pertuduhan dipinda terhadap masa, sama ada sebelum atau selepas perbicaraan bermula, keperluan notis di bawah s 402A KPJ tidak beraplikasi. Ia perlu diingati bahawa di mana pertuduhan berkaitan dengan suatu kejadian, meminda semata-mata, masa di dalam pertuduhan tidak semestinya bermakna menukar kejadian. Setiap situasi perlu bergantung kepada fakta dan keadaan sesuatu kes (lihat perenggan 31).]

Notes

For cases on alibi, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1665–1691.

For cases on charge in general, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 952–1386.

For cases on rape, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2693–2694.

Cases referred to

Shaafie Saibi v PP [2009] 3 CLJ 364, CA (refd)
Hussin bin Sillit v PP [1988] 2 MLJ 232 ; [1988] 1 CLJ (Rep) 128, SC (ref)
Ku Lip See v PP [1982] 1 MLJ 194; [1981] 1 LNS 155, FC (refd)
Rangapula & Anor v PP [1982] 1 MLJ 91; [1981] CLJ 261 (Rep) (refd)
Vasan Singh v PP [1988] 3 MLJ 412 ; [1989] 1 CLJ (Rep) 166, SC (ref)

Legislation referred to

Criminal Procedure Code s 402A
Penal Code ss 375, 376

Zalina bt Awang (Deputy Public Prosecutor) for the appellant.
Sundarajan a/l Sokalingam (Sundarajan & Co) for the respondent.

Teo Say Eng JC:

[1] This is an appeal by the learned deputy public prosecutor against the acquittal and discharge imposed by the learned Sessions Court Judge Ipoh at the end of the defence case. Initially, the respondent was charged as follows:

> Bahawa kamu pada bulan Disember 2002 semasa cuti sekolah dan pada bulan Februari 2003 bertempat di rumah Berek Tentera Kem Syed Putra Jalan Tambun, Ipoh, di dalam Daerah Kinta, di Negeri Perak Darul Ridzuan, telah dengan sengaja

melakukan persetubuhan dengan seorang budak perempuan bernama Sarinah bt. Amir, KPT: 901211-08-6018 yang ketika itu umur 13 tahun, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 kanun keseksaan.

[2] Before the commencement of the trial, the prosecution had amended the charge as follow:

Bahawa kamu, pada bulan Disember 2002, dirumah Berek Tentera, Kem Syed Putra, Jalan Tambun, Ipoh, dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah merogol seorang budak perempuan bernama SARINA BINTI AMIR, Sijil Beranak: I 621314, yang berumur 12 tahun dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[3] No objection was raised against the amended charge. The amended charge was read and explained to the respondent and he pleaded not guilty to the charge. The prosecution had called nine witnesses to prove its case against the respondent. At the end of the prosecution case, the learned sessions court judge found that a prima facie case had been made out under s 376 of the Penal Code and she called upon the respondent to enter his defence.

[4] The respondent elected to give evidence on oath. In his defence, he told the court that he no longer stayed in Kem Syed Putra in the month of December 2002 as he had moved out of Kem Syed Putra to stay in his own house in October 2002.

[5] At the conclusion of the defence case, the learned sessions court judge found that the defence story had successfully created a reasonable doubt in the prosecution case and found the respondent not guilty of the charge. The learned sessions court judge therefore acquitted and discharged the respondent at the conclusion of the trial. It is against such acquittal and discharge that appeal was filed by the learned deputy public prosecutor.

THE PROSECUTION'S CASE

[6] The prosecution case was that the victim (SP1) was a 12 year old primary six student of Sekolah Rendah Kebangsaan Poh, Bidor. During the school holidays at the end of 2002, she went to stay in the respondent's house which was an army barrack at Kem Syed Putra Jalan Tambun, Ipoh.

[7] During her stay there, she said she was sleeping in the same room with the respondent, that is, she was sleeping on the floor of the room whereas the respondent and his wife were sleeping on the bed in the same room. She said,

A one night, the respondent woke her up and asked her to go out of the room. She was brought by the respondent to a place near the kitchen. At that place the respondent took off her pants and leaned her against the wall. The respondent then lifted his cotton sarong which he was wearing and inserted his private part into her private part whilst both his hands were holding the complainant B against the wall. She said she felt severe pain as she could feel something had penetrated into her private part. She said she did not know how long the incident was but she saw the whitish substance discharged from her private part when the respondent pulled out his private part from her private part. After the incident, the respondent asked her to wash up and went to bed.

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[8] The victim ('SP1') told the court that such incident took place many times in the respondent's house in Ipoh. She said when she was raped by the respondent, she did not fight back because she felt as if her body could no D longer move and she said she was not happy with what the respondent had done to her. She also said she did not complain to her mother ('SP2') because she was frightened. She told the court that the respondent would harm her if she were to tell others about the incident. The victim ('SP1') took the opportunity to tell her mother of the incident only when her younger sister by E the name of Asridah told SP2 that she had been ravished by the respondent. Her mother (SP2) then brought her to the police station to lodge a police report.

[9] SP2 told the court that the respondent was her brother in law who F worked as a soldier staying with his wife in Kem Syed Putra Ipoh. She said her daughter the victim (SP1) went to stay in the respondent's house in Kem Syed Putra Ipoh for two weeks in December 2002. She came to know about the incident when her younger brother Rosdi bin Shahrudin ('SP3') told her that her two daughters Arisdah and Shahirah were sexually abused by the G respondent. When SP2 questioned Arisdah and Shahidah who admitted that they had been sexually abused by their uncle, the respondent. It was at that very moment the victim (SP1) told her mother that the respondent did same thing to her. SP2 then took her three daughters to Balai Polis Tapah to lodge a police report ('P2'). In her police report, she had alleged among other things that:

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> Sarina bte Amir, Umur 13 tahun (Tingkatan 1) telah memberitahu saya ia telah dirogol oleh Abah Jasli bin Saleh, pertama kali dirumah berek Tentera Syed Putra Tambun, Ipoh Perak pada bulan Disember 2002.

I **[10]** SP9 was 'the investigating officer' of this case. On 15 September 2003 he received a complaint from SP2 alleging that her three daughters namely Sarina the victim (SP1) Nor Shahirah and Ashrida had been raped by one Jasli bin Amir, the respondent. He took all the daughters including SP1 to Hospital Tapah on 15 September 2003 at 1.30am for medical examination by Dr Nor

Asmah. All the three daughters including the victim (SP1) were later on the same day at about 8pm referred to Dr Mas Adi ('SP8') at Hospital Teluk Intan for further examination.

[11] The examination on the victim (SP1) revealed that there was evidence of old penetration of the vagina by a blunt object and there were also old hymen tears noted at 3 o'clock position (0.5 cm) and 9 o'clock position (0.5 cm) and no other injuries in the genitalia: medical report on the victim Sarina bt Amir was produced and tendered in court as exhibit marked P3.

[12] In the examination-in-chief, SP8 was of the view that the old tear could have happened in December 2002. In fact SP8 also confirmed in cross-examination that it was also possible that penetration could have taken place while the child was in a standing position.

FINDINGS AT THE END OF THE PROSECUTION CASE

[13] At the conclusion of the prosecution case, the learned sessions court judge in her grounds of judgment stated:

> Atas kes pihak pendakwa, mahkamah ini membuat keputusan memanggil pembelaan YKT kerana mendapati keterangan SP1 disokong oleh SP2, SP3, dan SP8. Mahkamah mendapati ada terdapat keterangan prima facie atas tuduhan ini terhadap YKT.

[14] The learned sessions court judge was satisfied that there was prima facie evidence for her to decide to call upon the respondent to enter his defence.

[15] From the evidence adduced, I find that the prosecution had established a prima facie case by proving all the ingredients of rape under s 375 of the Penal Code namely that there was sexual intercourse between the respondent and the victim (SP1) and there was penetration and the sexual intercourse was without the consent of SP1 and the said sexual intercourse took place on one night in the month of December 2002 in the respondent's house in Kem Syed Putra Ipoh.

THE DEFENCE CASE

[16] Three alternatives had been explained to the respondent and he elected to give evidence on oath. In his defence the respondent said he no longer stayed in Kem Syed Putra in December 2002 because he had moved out from Kem Syed Putra to stay in his own house in Batu Gajah in October 2002. After moving out from Kem Syed Putra, he travelled to and fro from Batu Gajah to Kem Putra to work from 4.30pm to 6pm. He further testified that he was on

leave for the month of December 2002 and together with his wife they went back to Sabah. He gave his address in Batu Gajah as No 5, Persiaran 5, Taman Seri Cahaya Batu Gajah. He did admit that he stayed a night in the month of December in a friend's house at Kem Syed Putra before he went on leave to travel to Kuala Lumpur for Sabah. Two witnesses SD2 and SD3 gave evidence in support of his defence.

[17] According to SD2 Kapten (Ajutan) Mohd Adlie bin Mohd, a record officer for Kem Syed Putra Ipoh, the respondent had moved out of the Kem at JKR 4323 Blok AA Pintu No 4, Kem Syed Putra on 2 April 2002. In fact, SD2, said that it was he who handled the respondent's application for moving out. As a proof, SD2 tendered a *perintah bahagian dua askar laskar* dated 18 July 2002 ('exh D4') and said that he had signed on the said *perintah*. He told the court that it was not possible for the respondent to stay in Kem Syed Putra from November to December 2002 as the respondent was not allowed to do so by the *perintah.*

[18] Sarjan 1082374 Ramlan bin Abdul Aziz, SD3, who testified that he was *sarjan urus tadbir* at *pasukan tentera* at Kem Syed Putra from 2002 to 2003. He supported SD2's testimony that it was impossible that the respondent had continued to stay at Kem Syed Putra from November to December 2002.

[19] After hearing the defence put up by the respondent, the learned sessions court judge was of the view that the defence was not a defence of alibi and went on to consider in depth the respondent's defence in its entirety. The learned sessions court judge at the end of the defence case was satisfied that the defence had successfully created a reasonable doubt in the prosecution case. She therefore found the respondent not guilty of the charge and acquitted and discharged the respondent at the end of the defence case.

ISSUES FOR DETERMINATION

[20] The main issue for determination in this appeal is on the admissibility of evidence in support of the alleged defence of alibi in view of the failure of the defence to give notice in writing to the public prosecutor at least ten days before the commencement of the trial as required by s 402A of the CPC.

[21] The main bone of contention of the prosecution was that the evidence adduced by the defence was in support of an alibi defence and it was clearly not admissible as the defence had failed to give the prosecution ten days' notice before the commencement of the trial.

[22] On the issue of the admissibility of the alibi defence, I have, first and foremost, to determine in this appeal whether the learned sessions court judge

had misdirected herself in fact and in law in holding that the defence put forward by the respondent was not one of alibi. The learned sessions court judge in her grounds of judgment gave her reasons why she was of the view that s 402A was not applicable in this case:

> Bagaimanapun mahkamah ini berpendapat pembelaan YKT bukan setakat menyatakan beliau tidak hadir di Kem Syed Putra pada tempoh Disember 2002 tetapi berada di tempat lain. Pembelaan YKT telah dengan jelasnya dan tanpa keraguan menunjukkan kejadian rogol tidak mungkin berlaku di Kem Syed Putra pada Disember 2002 memandangkan YKT telah diberi perintah keluar (D4) oleh pihak tentera pada 2 April 2002.

[23] In determining whether the evidence put forward by the defence was evidence in support of an alibi as provided under s 402A of the CPC would depend on whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place at a particular time, he cannot be or is unlikely to be at the place where the offence is committed.

[24] A careful perusal of the evidence put forward by the defence tends to show that for the month of December 2002 the respondent no longer stayed at Kem Syed Putra as he had moved out from the Kem to stay in his own house at Batu Gajah in October 2002 and he said in December 2002 he had gone back to Sabah with his wife as he was on leave. His defence tends to show that by reason of his presence in Sabah during the month of December, it was unlikely that he was at the place where the offence was committed. He had called two witnesses to support his defence that he no longer stayed in Kem Syed Putra Ipoh for the month of December 2002. From the evidence adduced by the defence, it clearly shows that the defence put forward by the respondent was one of alibi, I, therefore find that the learned sessions court judge erred in law and in fact in holding that the defence raised was not a defence of alibi.

CONTENTIONS BY THE RESPONDENT

[25] On the alibi point, learned counsel for the respondent ('accused') did not dispute that no notice of alibi had been served in this case but instead strongly argued that s 402A is not applicable as the amended charge lacks sufficient particularisations as to the time and place of the offence alleged to have been committed.

[26] To support his contention, learned counsel relied on *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91; [1981] CLJ 261 (Rep) wherein Mohd Yusuf Abdul Rashid J said:

A The principles elicited from the above decision may equally be applicable to s 402A of the Criminal Procedure Code. In my judgment s 402A is not applicable and notice required to be sent thereunder need not be so served to render 'evidence in support of a defence of alibi' admissible:

(a) Where such evidence is in support of an alibi in respect of a day or time different B from those specified in a charge; and

(b) Where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge.

C **[27]** And again the judge said:

the general principle may be deduced from the above case in relation to the applicability of s 402A of the CPC and that is to say where there is insufficient particularisation in the charge regarding the place where the offence is alleged to have been committed, s 402A shall not apply.

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[28] Applying the above principles to this case, learned counsel submits that the charge in this case which states 'pada bulan Disember 2002 di rumah Berek Tentera, Kem Syed Putra' lacks sufficient particularisations regarding the time E and place where the offence was alleged to have been committed and is very much uncertain as to the time and place of the offence and therefore s 402A shall not apply.

[29] I find that the issue raised is without merits. It is not disputed that every F charge must state the time and place of the offence. It is sufficient if a charge contains a date or a period in which or a particular place where the offence is alleged to have been committed. In this case, the charge which states that 'bahawa kamu pada bulan Disember 2002 di rumah Berek Tentera Kem Syed Putra Jalan Tambun Ipoh' has specifically defined the time and place in which G the offence is alleged to have been committed and is therefore sufficient to enable the respondent to answer the charge: see *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194; [1981] 1 LNS 155 at p 196.

[30] Amendment as to the time of commission of offence has altered the H legal position as to the requirement of alibi notice.

[31] Learned counsel submits that in *Hussein Sillit v Public Prosecutor* [1988] 1 CLJ (Rep) 128 one of the questions of law of public interest for determination was whether the notice which was required to be served to I support a defence of alibi under s 402A need not be served when particulars relating to the time of the commission of the offence in the charge was amended during the trial. It was held that the amendment to the charge with respect to the time of commission of offence during the trial, that is from 8.30pm to 8pm did not exempt the accused from giving the notice which was

prescribed by s 402A. Learned counsel argues in his submission that *Hussein Sillit*'s case can be distinguished from our present case where the time of commission of the offence in the initial charge was in the months of December 2002 and February 2003 but on the day of the commencement of the trial, the time of commission of offence was amended to 'the month of December 2002'. Learned counsel submits that in *Hussein Sillit*'s case, there was only a difference of half an hour as to the time of the commission of the offence after the amendment of the charge whereas in our present case, the time of commission of offence was still within the month of December 2002 after the charge as to time of offence had been amended. Based on the factual situation of this case, learned counsel argues that such an amendment has altered the legal position as to the requirement of alibi notice and there was, therefore no duty for the defence to give any notice of alibi. I am unable to agree that in every case where the charge is amended as to time, either before or after the commencement of the trial, the requirement of notice under s 402A of the CPC does not apply. It should be borne in mind that where the charge relates to one occasion, merely amending the time in the charge would not necessarily constitute changing the occasion. Each situation must depend on the facts and circumstances of the particular case. For instance in *Hussein Sillit*'s case, the court was of the view that both the original and amended charges refer to one and the same occasion on the evening of 3 April 1981. Such an amendment as to time of offence does not alter the legal position as to the requirement of alibi notice. Similarly, in our present case, the original and amended charges also refer to one and the same occasion in the month of December 2002. For the reasons given above, I find that there are no merits on the second issue raised by learned counsel for the respondent.

[32] Errors or omission in the particulars as to time given in the original charge misled the respondent. The charge without specifying a particular date of the commission of an offence is defective and had prejudiced the respondent to a fair trial by not being able to raise the defence of alibi.

[33] Learned counsel for the respondent also submits that by reason of any error or omission in the particulars given in the original charge, the time, place and date of the alleged offence were so uncertain that he was infact misled in not supplying the particulars of alibi requirement to be given to the public prosecutor within the prescribed period. He submits that the time of the commission of offence stated in the initial charge was 60 days and after the charge was amended, the period in which the offence was alleged to have been committed was reduced to 30 days. There was no particular date of the commission of the offence. He therefore submits that such a charge without specifying a date of the commission of offence is defective and would prejudice the respondent to a fair trial by not being able to raise the defence of alibi.

[34] He cited the case of *Shaafie Saibi v Public Prosecutor* [2009] 3 CLJ 364 where the Court of Appeal held that:

> The first charge is in respect of an offence in October 1992 (without specifying any date or period in October and the second charge to an offence between 1992 and 1995. At the very outset we wish to observe that rape is not a continuing offence but a single act of unlawful sexual intercourse. An offence of rape cannot be committed from 1 October 1992 to 31 October 1992, as alluded to in the first charge nor can such an offence be committed between 1 January 1992 till 31 December 1995, as stated in the second charge, with the offence in the first charge patently overlapping in the second charge. When a charge prejudices the accussed to a fair trial by not being able to legitimately raise a defence of alibi that charge must be deemed defective.

[35] As to whether the respondent was misled in not supplying the notice of alibi by reason of error in the particulars given in the original charge as to time, I find that the amendment as to the time of the commission of offence in this case did not change the time which was completely different from that stated in the initial charge.

[36] In fact the amendment had narrowed the period in which the offence was committed from two months to one month. The amended charged is still grounded upon the same incident stated in the initial charge. I therefore do not see in what ways the respondent had been misled by the particulars as to time in the charge in not giving the alibi notice.

[37] As to whether a charge without stating a date when the offence was committed is defective, the law governing this issue is clear. It is not disputed that every charge must state the time of the commission of the offence as it is an essential ingredient of an offence. I find that a charge is not defective if it contains a date or a period in which an offence is alleged to have been committed. In *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194 where the Federal Court held that a charge is not defective even it had not stated when the offence was committed during the months of May and June 1978 if it had specifically defined the time and place sufficiently to enable the applicant to answer the charge.

[38] I am of the respectful view that as long as a charge has stated either a particular date or a period in which an offence is alleged to have been committed, coupled with the place where the offence is alleged to have taken place, such a charge would constitute sufficient notice to enable the accused to answer the charge and would not prejudice the respondent to a fair trial by not being able to raise the defence of alibi. To hold otherwise would be a great injustice to all victims of crimes who could not remember the exact date of the commission of the offence.

[39] I therefore find that the issues raised by learned counsel for the respondent are baseless and without merits.

[40] In the present case the fact that the respondent was able to state in his defence that he was no longer staying at Kem Syed Putra in Ipoh for the month of December 2002 as he had moved out from the camp and stayed in his own house in Batu Gajah since October 2002 and he was on leave for the month of December 2002 and had gone back to Sabah with his wife clearly shows that he had no difficulty in raising the defence of alibi. Unfortunately he failed to serve the notice within the days as prescribed by s 402A of the CPC.

[41] Lastly learned counsel for the respondent wishes to put an alternative argument that the evidence given by the respondent is not an evidence of alibi but as one of bare denial and should be considered by the court. He cited *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ (Rep) 166 where the Supreme Court stated: '… It is obvious, however, that an alibi defence will not be a simple statement of 'I did not do it. I was not there. I was not there. I was elsewhere.' That would be evidence of a bare denial.'

[42] Learned counsel submits that the respondent in this case says 'I did not do it. I was not there. I was elsewhere' and the evidence he called to support his defence was that he no longer stayed in the camp from April 2002 and not to support his whereabout during the month of December 2002. He therefore argues the court should not exclude the respondent's evidence but should instead consider the defence coupled with the overall evidence adduced in this case.

[43] I agree with learned counsel that the evidence given by the respondent should stay if it is evidence of a bare denial. But if it is evidence in support of an alibi and no notice under s 402A of the CPC has been given, the court must exclude that part of the evidence from its consideration of his defence: See V*asan Singh v Public Prosecutor* [1988] 3 MLJ 412 SC.

[44] However in our case, the defence raised whether by the accused himself or by his two other witnesses, clearly shows or tends to show that by reason of the presence of the accused at some particular place at a particular time he was unlikely to be at the place where the offence was committed. Such a defence is tantamount to the evidence in support of the alibi defence and must be excluded in the absence of notice under s 402A of the CPC given to the public prosecutor.

FINDINGS BY THE COURT

[45] Having decided that the defence raised was one of alibi and had not

been exempted from notice under s 402A of the CPC, the next issue for determination is whether the learned sessions court judge erred in law and in fact in holding that eventhough she was wrong in handling the issue of alibi but nevertheless she should in the interest of justice accept the defence of alibi since the evidence was overwhelming that the offence of rape could not have happened at the place and time stated in the charge.

[46] With respect, the learned sessions court judge must be made to understand that the law on the application of s 402A of the CPC is very strict. The intention of the Legislature has been clearly explained by Mohd Yusuf Abdul Rashid J as follows:

> Section 402A of the Code is enacted to prevent any person from fabricating an evidence of alibi and to enable the police to interrogate the intended witness or witnesses well before the date of trial to ascertain the validity of such a defence. It is indeed a condition precedent to the admissibility of the evidence of a witness purporting to support the alibi of an accused person. The non-compliance with the requirements of s 402A of the Code will render such evidence in support inadmissible. As such, a trial Magistrate has no discretion to admit any evidence in support of a defence of alibi where the provisions of s 402A of the Code have not been complied with. To allow such evidence to be admitted notwithstanding the breach of s 402A of the Code will defeat the intention of the Legislature to cure the mischief of an accused person manufacturing alibi evidence.

[47] Again in *Hussin bin Sillit v Public Prosecutor* [1988] 2 MLJ 232 ; [1988] 1 CLJ (Rep) 128 the Supreme Court said at p 130:

> it is clear law that where the defence is an alibi then, any evidence in support of that defence must be excluded unless notice is complied with. As was held in *Lim Chen Len* and approved by *Ku Lip See* and also ruled by the learned judge himself in *Rangapula* [1981] CLJ (Rep) 261, the court has no discretion to waive pre-trial notice where the evidence to be adduced by the defence is evidence in support of a defence of alibi.

[48] It is clear from the authorities cited, the object of s 402A is to prevent the accused from raising the defence of alibi at the last moment at the trial by holding back the names of his alibi witnesses. By allowing the defence to do so, it would mean that the police would be deprived of an opportunity to interrogate the said alibi witnesses well before the date of trial to ascertain the validity of such a defence.

[49] Applying the above principles to our case, I find that the learned sessions court judge had erred in law and in fact in admitting the alibi defence and in evaluating such a defence. In the absence of the alibi defence, I find that after

evaluating the evidence as a whole, the defence has failed to create a reasonable doubt in the prosecution case. I would therefore allow this appeal and set aside the order of acquittal and discharge.

[50] I order that a finding of guilt with conviction under the charge be recorded. In view of the seriousness of the offence, I sentence the respondent to 14 years of imprisonment with effect from today and eight strokes of rotan.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed